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In the

Supreme Court of the United States

October Term, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Petitioners,

v.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,

Respondents.

Petition for Writ of Certiorari to the California Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a state university, consistent with the First Amendment, compel all students to finance on-campus political groups whose educational function is merely incidental to their political goals?

2. May a state university, consistent with the First Amendment, compel all students to finance the adoption and publication of ideological viewpoints with which the students disagree?

3. May a state university, consistent with the First Amendment, compel all students to finance lobbying of state and city governments on a variety of issues with which the students may disagree?

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STATEMENT OF THE CASE

This case does not concern financial support of the chess club. Instead, the issues before the court below

concerned a sensitive balancing of fundamental First Amendment rights with the educational mission of the university.

The case before the Court does not concern a challenge to the curriculum of the university. Instead, at issue is the use of compelled student fees by an autonomous student organization.

Respondents were students at the University of California at Berkeley in 1979 or state taxpayers.[1] In order to register for classes, the students were compelled to pay a student activities fee, most of which was turned over to the student government,[2] the Associated Students of the University of California (ASUC). These funds made up approximately 60% of ASUC's total budget, the remaining funds coming from commercial operations such as the book store. These funds were spent on a variety of activities, only

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[1] Respondents Jimmy Hom, Alexa Smith, Averell Smith, and Brad Sparks were students at the university. Respondents Arlo Smith and Adlai Smith were named as plaintiffs below as taxpayers pursuant to California's taxpayer standing law. Cal. Code of Civ. Proc. § 526a.

[2] During discovery in this case ASUC stated that they could not "truthfully admit or deny" the statement that it was the recognized "student government of the University of California." Record at 682, 706. Instead, the most ASUC would admit to was that there was an oral understanding between it and the university by which the university recognized the ASUC as a "California non-profit unincorporated association." Record at 706. Any further official connection with the university was dependent on pending negotiations between ASUC and the university. *Id.*

three of which are at issue here: (1) lobbying of city and state governments; (2) adoption of ideological resolutions by the ASUC senate; and (3) financing of campus political groups.

The Structure of the ASUC. The ASUC describes itself as an "autonomous constituency of the university community." Record (R.) at 485.[3] Contrary to the suggestion in the petition, the university exercises little control over the activities of the ASUC. Indeed, in quoting from the appendix petitioner leaves out a crucial portion of the sentence, completely changing the meaning of the passage in question.[4] The quote in Footnote 1 of the petition leaves the impression that the university exercises control over the ASUC to ensure compliance with university policy. The language deleted, however, makes clear that the university's

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[3] References to the record are to the Appellants' Appendix in Lieu of Clerk's Transcript that was filed in the court below.

[4] Petitioners' statement of facts relies heavily on the superseded opinion of the California Court of Appeal. Under California law, this opinion is not citable for such a purpose. California Rules of Court, Rule 977. In any event, it is noteworthy that in coming to the opposite conclusion of the Court of Appeal the California Supreme Court did not make the same factual findings as the intermediate appellate court. Thus, the facts on which petitioners rely in their statement of the case are not those relied upon by the California Supreme Court in its decision. Indeed, the California Supreme Court specifically criticized some of the factual conclusions of the Court of Appeal. *E.g.*, Appendix to Petition for Writ of Certiorari (Pet. App.) at 23a-24a.

power is limited. The full quote, with petitioners' deletion in italics, is as follows: "[The university] may take action to ensure that any activity under control of student governments is operated in accordance with *sound business practices consonant with* university policies and procedures *applicable to such practices*." Pet. App. at 91a. Control over student government expenditures can only take place "to the extent necessary to maintain financial solvency." *Id.*

In this case, there is nothing in the record to establish that the university either controlled, approved, or disapproved of the expenditures at issue. Instead, the record indicates that the university simply turned over the compelled fees to the ASUC for disposition as ASUC saw fit.

Lobbying Activities at Issue. Compelled fees were used to support two different lobbying groups: the ASUC Municipal Lobby and the University of California Lobby. The Municipal Lobby lobbied the City of Berkeley on issues from rent control to nuclear weapons and divestment in companies doing business with South Africa. Pet. App. at 4a; R. at 979. The Municipal Lobby was also active in endorsing student candidates for municipal office. Pet. App. at 4a. The University of California Lobby had a perspective that was at once less global than the Municipal Lobby yet was concerned with issues throughout the University of

California system. That lobbying included support for a proposal to finance abortions with student fees, opposition to budget cuts for the university, and support for continued mandatory student fees. *Id.* Of course, the University of California Lobby did not limit itself solely to university issues. The lobby also supported a constitutional amendment enacting a journalist shield law, supported lowering the drinking age from 21 to 19, and opposed outlawing the granting of preferences on the basis of race. R. at 994. When these positions were taken, the lobbyists represented to the Legislature that they spoke on behalf of *all* University of California students. R. at 969.

Ideological Resolutions Adopted. The ASUC Senate, a branch of the student government at the Berkeley campus, did not limit its activities to governance of student affairs. Instead they adopted resolutions supporting gay rights and voting rights for ex-convicts. R. at 692-93, 703. Other resolutions opposed nuclear weapons, nuclear power, and the CIA. R. at 695, 698, 701-02. The ASUC Senate also adopted resolutions concerning electoral politics. In addition to supporting various ballot propositions, resolutions were also adopted supporting the reelection of Congressman Dellums. Reporters Transcript at 221. Nor were the concerns of the ASUC Senate limited to this country. Resolutions were

adopted concerning South Africa, Argentina, the Soviet Union, and supporting attempts to convince Third World countries to boycott Nestle baby formula. R. at 694, 696.

The resolutions weren't simply adopted and forgotten. The ASUC took steps to publicize the positions taken by the ASUC Senate. These steps included placing advertisements in the student newspaper, distributing posters, leaflets and flyers, sponsoring rallies and workshops, and placing notices on campus bulletin boards. Pet. App. at 29a. In addition to paying for this publicity, the compelled student fees also finance the "operation expenditures for the ASUC Senate." *Id.*

Campus Political Groups. Finally, compelled student fees are used to finance a variety of student groups. The funding of the vast majority of these groups is not at issue in this case. Instead, the respondents in this case only objected to the funding of campus political groups--14 in total. These groups included Amnesty International, Berkeley Students for Peace, Campus N.O.W., Campus Abortion Rights Action League, Gay and Lesbian League, Progressive Student Organization, Radical Education and Action Project, Spartacus Youth League, Students Against Intervention in El Salvador, Students for Economic Democracy, UC Berkeley Feminist Alliance and Women Organized Against Sexual

Harassment, UC Sierra Club, Conservation and Natural Resources Organization, and Greenpeace Berkeley. Pet. App. at 5a. Funding was not provided for mainstream political groups or religious groups. Petition for Writ of Certiorari at 4.

These groups are undoubtedly political and ideological in their focus. The Spartacus Youth League, for instance, described itself as seeking "'to build a revolutionary socialist movement which can intervene in all social struggles armed with a working class program based on the politics of Marx, Lenin and Trotsky, as part of a disciplined revolutionary movement.'" Pet. App. at 21a. The group supported the Soviet invasion of Afghanistan and opposed the Solidarity movement in Poland. *Id.*

While opposing the use of dissenting students' compelled fees to finance these organizations, respondents do not suggest limiting the free speech activities of any group. Respondents sought only to avoid compelled financial support for political messages with which they disagreed. Neither the complaint in this action nor the decision of the California Supreme Court will in any way diminish the freedom of any student or group of students to engage in political speech on the Berkeley campus.

SUMMARY OF ARGUMENT

Review is not warranted in this case because the California judicial proceedings are not yet final. The decision of the California Supreme Court contemplates further proceedings at which the university will be given an opportunity to establish that the educational value of the activities at issue outweigh the First Amendment injury or that compelled student fees have not been spent in the manner alleged. Until this inquiry has been completed, there is little for this Court to review other than the holding that off-campus political activity may not be funded with compelled fees--a holding that is consistent with the decision of every other court to review the question.

Review cannot be justified on the basis of a conflict in decisional law. The California Supreme Court's decision makes clear that it was following existing federal precedent. The conflict that petitioners attempt to create results from comparing factually dissimilar cases. Finally, petitioners themselves are in conflict with the decisions on which they rely on the issue of off-campus political activity.

ARGUMENT

I

CALIFORNIA JUDICIAL PROCEEDINGS ARE NOT YET FINAL

As a result of the California Supreme Court decision, not a single student political group has been denied funding nor has the ASUC Senate been prohibited from enacting a single resolution. This is because the California Supreme Court decision contemplates further proceedings both in this action and beyond. In fact, the only final determination of the California Supreme Court is that dissenting students' compelled fees could not be used for off-campus political activities, such as the Municipal Lobby and the University of California Lobby. This was a determination on which the California Supreme Court was in unanimous agreement. Pet. App. at 27a, 51a. It is a determination that is in accord with the decision of every other court to consider the question. *E.g.*, *Carroll v. Blinken*, 957 F.2d 991, 1002 (2d Cir. 1992); *Galda v. Rutgers*, 772 F.2d 1060, 1065 (3d Cir. 1985).

The California Supreme Court did not rule that any particular student political group could no longer receive compelled student fees. Instead, the court below ordered the university to establish a procedure similar to that outlined in

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), if the university decided to implement educational programs that burden First Amendment rights. Pet. App. at 22a. The court noted that the use of compelled fees to support political groups is permissible unless the group's educational function is merely incidental to the political and ideological activities. *Id.* When the attainment of the group's political goals predominate, the infringement of dissenting students' constitutional rights can no longer be justified by the claimed educational benefit. *Id.*

The court also intimated that overtly political groups could continue to receive university financial support under a different funding mechanism. The court's ruling requiring a *Hudson* hearing applied only to political groups that are funded from compelled student fees. *Id.* Thus, on the state of this record, petitioners can only argue that the university has been prohibited from using compelled fees of dissenting students to finance overt political activity with only an incidental educational benefit.

Similarly, there was no final court ruling on the issue of ideological resolutions adopted by the ASUC Senate. The court noted that the university denied that any compelled fees were spent for this activity, but also noted that the publicity for the resolutions must logically cost something "if only for

paper and ink." Pet. App. at 29a. Finally, the court concluded that neither the trial court nor the intermediate appellate court had yet to address adequately the factual and legal issues involved in this issue. *Id.* The court remanded this question to the lower court to resolve whether compelled fees were spent on political activities of the ASUC Senate. If so, the university would have the burden of establishing that the resulting burden on dissenting students' First Amendment rights was justified by the educational value of the activities in question. As with student political groups, the university must establish that the educational value of the program is more than merely incidental to the political activity. Pet. App. at 30a. Because these determinations have yet to be made, there is nothing for this Court to review at this time. The petition for writ of certiorari should be denied.

II

THE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS

The major premise of the petition is that the decision below conflicts with the Second Circuit's decision in *Carroll*

v. Blinken.[5] In fact, however, the California Supreme Court explicitly harmonized its decision with both that of the Second Circuit in *Carroll* and that of the Third Circuit in *Galda v. Rutgers*. Pet. App. at 13a-19a.

The real problem with comparing the decision below to that in *Carroll* is that where *Carroll* involved a challenge to a single specific expenditure, the California Supreme Court treated this case as something more akin to a facial challenge. As noted above, the California Supreme Court did not prohibit the use of compelled fees for a single student group. Instead, the court set out guidelines by which the university could determine the types of groups that could receive compelled fees regardless of dissent. The guiding light for the university is whether the educational benefit is merely incidental to the accomplishment of the group's political objectives. Pet. App. at 22a.

This analysis fits easily within the specific factual findings of the Second Circuit in the *Carroll* case. In *Carroll*, the court noted that while NYPIRG was a political group with definite political goals, its on-campus activities

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[5] Of course, petitioners' position conflicts in substantial measure with the decision in *Carroll*. Where the *Carroll* court prohibited off-campus political activities with dissenters' fees, petitioners seek authority to spend dissenters' compelled fees to lobby city government and the State Legislature. *Compare Carroll*, 957 F.2d at 1002 *with* Petition for Writ of Certiorari at 28-30.

were described as being more educational in nature. The court described those activities as primarily research and the sponsorship of symposia and debates. *Carroll*, 957 F.2d at 994. It should also be noted that the university in *Carroll* took a more active role in approving the expenditures at issue. The activities on which student fees could be spent were specifically described in regulations adopted pursuant to New York's education law. The regulation at issue there required the fees to be spent on educational activities. *Id.* at 993 n.4. The decision to fund a particular group was also approved by the university president. *Id.* at 993. No similar university controls or approval processes exist in the instant action. Thus, to the extent that petitioners seek to find conflict with the *Carroll* decision, they do so on the basis of dissimilar facts.

The decision is also consistent with the prior rulings of this Court. This Court has long held that the use of compelled fees for political activities has an impact on the fee payers' First Amendment rights to freedom of speech and association. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977); *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990). Thus, the purpose for mandating payment of the fees must be supported by a compelling governmental interest. *Hudson*, 475 U.S. at 303 n.11. This is precisely

the analysis that was employed by the court below. Pet. App. at 10a. The court below noted that this analysis was also employed by the Second Circuit in *Carroll* and the Third Circuit in *Galda*. Pet. App. at 13a-19a. Thus, there is no conflict for this Court to resolve and the petition should be denied.

CONCLUSION

This case is not appropriate for review on certiorari at this time. The decision below contemplates further judicial review in California both in this case and beyond. Further, there is no decisional conflict with the Federal Circuit Courts of Appeals. The California Supreme Court noted that it was applying the same analysis as was applied in both the Second Circuit's *Carroll* decision and the Third Circuit's decision in *Galda*.

Despite petitioners' attempts to frame it so, this case has nothing to do with public forum analysis. In arguing that they do nothing more than create a public forum by financing *some* student political groups petitioners argue that there is no constitutional distinction between allowing these groups to use the university auditorium and buying each group its own auditorium to use however it wishes. This is nonsense. This case is not about opening up the Berkeley campus to differing

points of view. It is instead about financing some students' political views with the compelled fees of other students who disagree. The only educational purpose served by such a system is an object lesson of what life would be like without the First Amendment. Educational perhaps, but beyond the pale for even the ivory towers of the university.

For these reasons, the petition should be denied.

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Respectfully submitted,

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